Supreme Court, U.S.
FILED
JUN 19 1991
OFFICE OF THE CLERK

No. 90-1769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INTERSTATE COMMERCE COMMISSION

and

UNITED STATES OF AMERICA,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR BOSTON AND MAINE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly set aside the Order of the Interstate Commerce Commission and remanded for further proceedings on the grounds that the Commission failed to make the requisite findings of fact and determinations under Section 402 of the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. § 562, before allowing Amtrak to exercise its power of condemnation.

2. Whether the court of appeals' reversal of the Interstate Commerce Commission's Order exceeded the proper scope of review.

PARTIES TO THE PROCEEDING

Respondent is Boston & Maine Corporation ("Boston and Maine"). Boston and Maine is a wholly owned subsidiary of Guilford Transportation Industries, Inc., a privately held corporation. Petitioners are the Interstate Commerce Commission and the United States of America. Parties that participated in the proceedings below that are not listed in the caption of the case in this Court are the following:

1. National Railroad Passenger Corporation ("Amtrak")[1]
2. Central Vermont Railway, Inc.[2]
3. Windsor Minerals, Inc.
4. The State of Vermont
5. The Commonwealth of Massachusetts
6. Canadian Pacific, Ltd.
7. The Railway Labor Executives Association

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[1] Amtrak is a national passenger railroad created by an act of Congress and incorporated in the District of Columbia. The United States Department of Transportation is its controlling shareholder, and the majority of its board of directors consists of federally-appointed members. Various commercial railroads maintain dormant equity interests in Amtrak, exercising no control and receiving no financial benefit by virtue of such interests.

[2] CV is wholly owned by Grand Trunk Corporation, which is wholly owned by the Canadian National Railway Company, a Crown corporation of Canada, wholly owned by the Canadian government.

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BRIEF FOR BOSTON AND MAINE CORPORATION IN OPPOSITION

Respondent Boston and Maine Corporation ("Boston & Maine"), petitioner below, respectfully requests that this Court deny the petition of the Interstate Commerce Commission (the "Commission" or the "ICC") and the United States of America for a writ of certiorari, seeking review of the District of Columbia Circuit's judgment in this case entered on August 10, 1990, reported at 911 F.2d 743 (1990), and its

order denying rehearing entered on February 1, 1991, reported at 925 F.2d 427 (1991).[1]

STATEMENT OF THE CASE

A. Background

Prior to 1988, Boston and Maine and Central Vermont Railway, Inc. ("Central Vermont"), long-time competitors for freight rail business in New England, each owned large stretches of the Connecticut River Line ("Conn River Line"), a rail line running between Springfield, Massachusetts and White River Junction, Vermont.[2] Each had the right to run over the other's rails in accordance with a trackage rights agreement dating back to 1930.

For more than a century, Boston and Maine and Central Vermont and their predecessors provided competing freight service along the Conn River Line. The Conn River Line stands, in a sense, as a fulcrum balancing two competing giants to the north. At White River Junction, Vermont, the Conn River Line connects with that of the Canadian National Railway Company ("CN"), which continues on to Montreal, Quebec. At Wells River, Vermont, the Conn River Line connects with Canadian Pacific ("CP"), whose lines proceed north and into eastern Canada. The Conn River Line is an integral part of a larger line

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[1] A petition for writ of certiorari (No. 90-1419) seeking review of the same judgment was filed by the National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. on March 11, 1991. References to "Pet. App." in this opposition are to the Appendix to that petition.

[2] The facts are contained in the Commission record before the Court of Appeals, in some instances in Verified Statements filed in the Commission proceedings.

linking both Canadian rail systems (CN and CP) to U.S. rail carriers in the Northeast.

In 1972, Amtrak began using the Conn River Line to provide passenger service (the "Montrealer") between Montreal and Washington, D.C. Amtrak eventually became concerned about the speeds—sufficient for Boston and Maine's freight traffic—that the track condition required of Amtrak's passenger trains. Boston and Maine deemed speeds of 25 miles per hour or less as sufficient for its freight operation but Amtrak demanded that Boston and Maine maintain the track to a degree sufficient to allow passenger trains to operate at speeds of up to 60 miles per hour. The difference in maintenance costs between these two speeds was approximately $400,000 per year.

In the fall of 1986 and spring of 1987, Amtrak and Boston and Maine representatives were involved in ongoing discussions concerning Amtrak's interest in upgrading the Conn River Line and the desirability of the appropriation of federal funds to underwrite the cost of the necessary work. The discussions between Amtrak and Boston and Maine centered around a dispute as to the responsibility for the cost of upgrading the tracks, with Boston and Maine taking the position that it would cooperate in the project to upgrade the tracks provided that Amtrak agreed to pay its share of the costs associated with maintaining tracks suitable for trains traveling at 60 miles per hour. Ultimately, Amtrak persuaded Congress to appropriate $5 million for rehabilitation of the Conn River Line. Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447-48.

In April 1987, flooding of the Connecticut River caused Boston and Maine to suspend all service on

the Conn River Line for several days. When the flood waters subsided, Boston and Maine resumed its freight operations over the Conn River Line and authorized the resumption of passenger service. Amtrak abruptly decided that it would not operate the Montrealer. Amtrak contended that it stopped running the Montrealer due to the allegedly poor condition of the Conn River Line although the condition of the track was the same after the flooding as it was before the flooding.

Section 402(a) of the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. § 562(a) ("RPSA") provides that, when Amtrak and a railroad are unable to agree on the terms and conditions for Amtrak's use of the railroad's tracks and other facilities, the Commission, on Amtrak's request, may "order the provision of services or the use of tracks or facilities of the railroad by [Amtrak], on such terms and for such compensation as the Commission may fix as just and reasonable." 45 U.S.C. § 562(a). At no time, however, did Amtrak seek the ICC's assistance in its ongoing negotiations with Boston and Maine. Instead, while ostensibly negotiating in good faith with Boston and Maine about upgrading and maintenance costs, Amtrak began secret negotiations with Central Vermont.

B. Agreement Between Amtrak and Central Vermont

By September 1987—a full six months before Amtrak filed the condemnation petition at issue in this proceeding—Amtrak and Central Vermont had retained consultants to appraise the Boston and Maine portion of the Conn River Line. By early January 1988, Amtrak and Central Vermont had formulated "a plan to initiate a proceeding in which Amtrak will

condemn [Boston and Maine's] interests in the line and subsequently assign those interests to Central Vermont." Memorandum of Gerald L. Maas to Ronald E. Lawless, Jan. 6 1988, Brief of Boston and Maine Corporation (Aug. 9, 1989) at 67a. *See* 911 F.2d at 746. The written plan observed that while "Amtrak has the authority . . . to condemn [the property] . . . *Amtrak does not want to own or operate the* [*Boston and Maine*] *Line, and has no funds to acquire it. Therefore, Amtrak will proceed with condemnation only if it is fully indemnified* [by Central Vermont]." *Id.* (emphasis added).

The plan set forth a two-step process for Central Vermont's acquisition of the Boston and Maine portion of the Conn River Line. First, Amtrak was to offer $1 million, supplied by Central Vermont, for Boston and Maine's interest, and to withdraw the offer if it were not immediately accepted. Significantly, the plan noted, "we have reason to believe [Boston and Maine] will not accept [the offer]." *Id.* Second, a condemnation proceeding under RPSA Section 402(d) would be initiated in which "[w]e will probably contend that 'just compensation' is something less than the amount we originally offered." *Id.*

The negotiations between Amtrak and Central Vermont resulted in three contracts dated March 18, 1988. The first contract (the "Acquisition Contract") required Amtrak to acquire the Boston and Maine portion of the Conn River Line and convey it to Central Vermont. One million dollars to accomplish this objective was provided by Central Vermont. The Acquisition Contract dictated the specific steps leading to Central Vermont's acquisition of the Boston and Maine interests and detailed the extent to which Cen-

tral Vermont would control the exercise of Amtrak's condemnation powers.

The Acquisition Contract provided that Central Vermont was to develop "expert testimony to be adopted and offered by Amtrak as its [own] evidence on just compensation and other issues in the § 402(d) proceeding." Central Vermont was to pay all but $100,000 of the "Common Expenses" incurred in the condemnation proceeding and alone was to determine whether the petition should be withdrawn. Absent such withdrawal, Amtrak was bound to prosecute aggressively the Section 402(d) application until receipt of a final order. In addition, Central Vermont was to indemnify Amtrak for any damages awarded to Boston and Maine if the petition were withdrawn.

The other two agreements, a "Rehabilitation Contract" and an "Operating Contract," supplied the *quid pro quo* for Central Vermont's use of Amtrak's condemnation power. The Rehabilitation Contract obligated Central Vermont to rehabilitate the Conn River Line to standards specified by Amtrak for payments which "will in no event exceed $3.1 million," and the Operating Contract granted Amtrak the right to use the Boston and Maine line for twenty years.

C. Proceedings Before the Commission

On March 18, 1988, Amtrak gave Boston and Maine its ultimatum. In response to Amtrak's "take-or-leave" offer, Boston and Maine reaffirmed its desire to cooperate in the project to upgrade the tracks and expressed its willingness to submit the issue of apportionment of additional costs to a third party such as the ICC for resolution. Amtrak treated Boston and Maine's response as a rejection and promptly pro-

ceeded with condemnation proceedings under RPSA Section 402(d), 45 U.S.C. § 562(d).

The Commission granted the application of Amtrak to condemn the 49 miles of Boston and Maine Conn River Line property and to reconvey that property to Central Vermont. *National Railroad Passenger Corp.*, 4 I.C.C. 2d 761 (1988).

D. Review By the Court of Appeals

On the petition of Boston and Maine, the court below reversed the ICC Order and remanded the case for further proceedings. *Boston and Maine Corp. v. ICC*, 911 F.2d 743 (D.C. Cir. 1991). The court held that the ICC failed to make the necessary fact findings and determinations under RPSA and, further, that the ICC's construction of RPSA "is contrary to its unambiguous meaning." 911 F.2d at 753. Because the ICC's findings utterly failed to address the prerequisites in section 402(d)(1)(A) and (B) to the issuance of a valid condemnation order, the majority concluded that "the ICC's conclusory assertions fail the requirement of reasoned decisionmaking" and set aside the Commission's order. *Id.* Judge Ruth B. Ginsburg concurred in the majority's assessment of the Commission's fact-finding, concluding that "the ICC shirked its obligation in this case to monitor closely Amtrak's exercise of the broad eminent domain power conferred by section 402(d) of the RPSA." *Id.* at 755.

Petitioners sought rehearing from the court of appeals and, while the petition was pending, Congress enacted the Independent Safety Board Act Amendments of 1990. Pub. L. No. 101-641, 104 Stat. 4654 ("1990 Amendment"). Section 9(a) of the 1990 Amendment provides that in the case of a condem-

nation under Section 402(d)(1) of RPSA, Amtrak may subsequently convey title or other interest in the property condemned to a third party, if such reconveyance is found by the Commission to further the purposes of RPSA. 104 Stat. at 4658. The 1990 Amendment was brought to the attention of the court of appeals which, after consideration, denied rehearing in a *per curiam* opinion. *Boston and Maine Corp. v. ICC*, 925 F.2d 427 (D.C. Cir. 1991).

In its Order denying rehearing, the court held that the 1990 Amendment "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.' " 925 F.2d at 428. The court had originally voided Amtrak's reconveyance of Boston and Maine's rail lines to Central Vermont not only because it found no express congressional authorization for that transaction but also because the Commission did not support with adequate findings of fact its approval of the initial condemnation of Boston and Maine's property. In considering the 1990 Amendment, the court stated that, while the new language plainly authorizes Amtrak to convey property *subsequent* to a condemnation that is otherwise valid under RPSA Section 402(d)(1), it does no affect the requirement under the statute that Amtrak's use of its eminent domain power must be justified in the first instance. *Id.*

ARGUMENT

The thrust of the government's petition is that the court of appeals improperly restricted an important statutory tool given Amtrak by Congress and that when Congress, by subsequent legislation, attempted

to overturn the decision, the court below "defied [the] congressional directive" (Pet. p. 12). According to the government, the result is the frustration of congressional will, the disruption of Montrealer service through Vermont and, ultimately, the impairment of Amtrak's negotiating position in reaching trackage rights agreements with the nation's freight railroads. Underlying these contentions is a mischaracterization of the statutory scheme contained in RPSA, an inaccurate interpretation of the 1990 Amendment, and an overwrought prediction of the consequences of the decision below. The principal defect in the government's position is, however, its failure to deal directly with the core of the ruling below, on which the court of appeals was unanimous, namely, the complete failure of the Commission to consider and make appropriate fact findings and determinations regarding the various processes available under Section 402 of RPSA. Under the statutory framework, these findings and determinations are required to be made before Amtrak may condemn another railroad's line, particularly in light of the availability of lesser interests which might fully service Amtrak's needs, consonant with the statutory framework.

The 1990 Amendment does not affect the court of appeals' central determination that the Commission's proceedings were flawed by the absence of adequate fact findings and determinations on the question of Amtrak's need for Boston and Maine's interest in the Conn River Line. The court of appeals properly remanded this case to the ICC. In these circumstances, this case does not warrant review by this Court.

1. In 1970, Congress enacted the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, 84 Stat.

1327 ("RPSA" or the "Act"), which created the National Railroad Passenger Corporation ("Amtrak") in an effort to reinvigorate intercity rail service. The Act provides in Section 402(a) the procedures by which Amtrak can secure the services, facilities and properties it requires at reasonable costs from the nation's freight railroads. The statute goes on to provide that:

> In the event of a failure to agree, the Interstate Commerce Commission shall, . . . if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by [Amtrak], on such terms and for such compensation as the Commission may fix as just and reasonable. . . . In fixing just and reasonable compensation for . . . the use of tracks . . . the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation.

45 U.S.C. § 562(a).

Shortly after the enactment of RPSA, it became apparent that Amtrak was often unable to lease or purchase, on reasonable terms, properties that were required for its intercity passenger services. In an effort to deal with this and other concerns, Congress passed the Amtrak Improvements Act of 1973, Pub. L. 93-146, 87 Stat. 552 (1973) (the "1973 Amendment"). The 1973 Amendment, *inter alia*, added subsection (d) to Section 402 of RPSA providing that if Amtrak and another railroad are unable to agree on terms for the sale of property (including interests in

property) owned by the railroad required for intercity rail passenger service, Amtrak may apply to the Commission for the condemnation of that property unless the Commission finds that conveyance of the property would significantly impair the ability of the railroad to carry out its obligations as a common carrier and the obligations of Amtrak can adequately be met by the acquisition of alternative property, including interests in property, which is available for sale on reasonable terms to Amtrak.

The Senate Report on the 1973 Amendment illustrates the circumstances in which it was contemplated that Amtrak might be placed in a disadvantageous bargaining position and thus need the added powers conferred by the 1973 Amendment. The Senate Report describes an instance where Amtrak leases terminal or other facilities from various railroads but such facilities are not always best adapted to its needs. Thus, it may make more economic sense for Amtrak to build a new facility at a different location on the railroad's property. The Senate Report recognizes that "[u]nder these circumstances, there is little economic incentive for the railroad to make alternative sites available to Amtrak. The result in that Amtrak cannot acquire property it needs at a reasonable price." S. Rep. No. 226, 93 Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2326-27.[3]

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[3] Amtrak's President, Roger Lewis, testified in 1973 on the legislation that became Section 402(d) by providing the example described in the Senate Report regarding the location of stations. In supporting the legislation, he stated: "We are really speaking here of rather modest applications of this principle [of eminent

In this case, Amtrak did not make a good faith effort to come to an agreement with Boston and Maine regarding the upgrading of the Conn River Line. To do so would have required Amtrak to bear the incremental costs involved, consistent with the Congressional policy set forth in the statute against cross-subsidization which was designed to prevent one segment of the rail industry being required to bear the expense of facilities and improvements of primary benefit to another. *See General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1054-55 (D.C. Cir. 1984). Instead, Amtrak made a take-it-or-leave-it offer to Boston and Maine as part of its arrangement with Central Vermont. Amtrak knew in advance that the offer would be rejected and then proceeded to a condemnation proceeding before the ICC.

In response to the plea by Boston and Maine that Amtrak had failed to pursue any of the procedures under Section 402, save condemnation, the Commission held that Amtrak had an "election of remedies" and that it need not consider the various alternatives set forth in Section 402.

The court of appeals held that the unambiguous meaning of the statute, fully supported by its legislative history, required the ICC to consider and make findings regarding the various alternatives contem-

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domain]."

Congressman Shoup of Montana responded to this testimony: "I think what probably is reassuring is to hear you say it is only a minimal amount of time you would exercise [the power of eminent domain] . . . . " Amtrak Improvements Act of 1973: Hearings on H.R. 8351 Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 93rd Cong., 1st Sess. 60 (1973).

plated by the statutory scheme. It found that the Commission had virtually ignored the various issues required to be considered in administering section 402 of RPSA. The court pointed out that while use of Boston and Maine's Line was obviously needed for intercity rail passenger service, it did not have to condemn the entire fee interest in the line in order to provide that service. "Rather, what it required, and what in fact was all it sought in substance if not in form, was not title to the Boston and Maine segment but its use in a condition permitting resumption of the Montrealer service." 911 F.2d at 750. The court of appeals pointed out that Amtrak could have commandeered that use under section 402(a), which authorizes the ICC to order the parties to enter into an appropriate trackage rights agreement. Further, the court of appeals found that Amtrak could have invoked section 402(d) to secure an easement over the Boston and Maine segment, together with the right to improve and maintain the easement consistent with the granted use. The acquisition of this lesser interest would have met Amtrak's needs and in light of the requirements of subsections 402(d)(1)(A) and (B), condemnation of a greater interest was neither necessary nor permissible.

The court of appeals also found that the ICC failed to give proper consideration to the issue of whether the requested condemnation will significantly impair Boston and Maine's ability to carry out its obligations as a common carrier and whether Amtrak's needs can be adequately met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to Amtrak. Boston and Maine made an explicit claim of signifi-

cant impairment before the ICC, and the court of appeals held that it would not uphold the ICC's determination that "dismisses [Boston and Maine's] detailed exposition with a cursory statement that its ability to carry out its common carrier obligations will be adequately protected by the terms of a trackage rights agreement dictated by its competitor, Central Vermont." 911 F.2d at 751.

The court of appeals further found that the ICC failed to consider adequately whether Amtrak's needs could be met by an alternative property interest, short of condemnation, and that the ICC's Order effectively read "the words 'interest in property' out of the statute." *Id.* Finally, the court of appeals held that its interpretation of the interplay between subsections (a) and (d) of Section 402 was further supported by Congress's policy against cross-subsidization.

Although Judge Ruth B. Ginsburg disagreed with the majority on the construction of Section 402, she concurred that a remand was warranted based "on the inadequacy of the Commission's assessment *in this case*" of the determinations required by RPSA. 911 F.2d at 753 (emphasis in original).

After carefully describing Amtrak's contentions before the Commission which purported to support invocation of the condemnation power, Judge Ginsburg stated that:

> Had the ICC found from the record that the picture painted by Amtrak was accurate, therefore, I would uphold the challenged transaction.
>
> No such ICC determination, however, can be gleaned from this record.

911 F.2d at 754.

Instead, Judge Ginsburg observed that "[t]ugging just the other way," the ICC conceded before the court of appeals that it had made no independent effort to ascertain whether the Conn River Line conveyance was required to meet Amtrak's passenger service obligations. 911 F.2d at 754-55. Judge Ginsburg further pointed out that the ICC disavowed any doubt as to Boston and Maine's competence to maintain the track in question. In Judge Ginsburg's words, "the ICC shirked its obligation in this case to monitor closely Amtrak's exercise of the broad eminent domain power conferred by Section 402(d) of the RPSA." 911 F.2d at 755.

In light of the unanimous holding of the court of appeals that the ICC failed to make the statutorily required findings and determinations under Section 402 of RPSA regarding Amtrak's use of the condemnation power, it is clear that, contrary to the government's petition, no important federal question is presented and review by this Court is not warranted.[4]

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[4] The government's suggestion of a conflict with *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) is without merit. *Two Parcels* involved the condemnation of non-railroad property held by a private party, under Section 305(d)(1)(B) of RPSA. 45 U.S.C. § 545(d)(1)(B)(1988). The policy concerns about competition in the rail industry, particular cross-subsidization, inherent in Section 402 of RPSA are not germane to Section 305. Moreover, in *Two Parcels*, the adequacy of the ICC's findings in support of Amtrak's condemnation was not challenged and, therefore, was not evaluated by the court of appeals. In contrast, the adequacy of the ICC's findings on the need for Amtrak's condemnation is central to the court of appeals' decision in this case. Thus, there is no conflict justifying review by this Court.

Nothing in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.* 467 U.S. 837 (1984), and *Mobil Oil Exploration & Production Southeast Inc. v. United Distribution Co.*, 111 S. Ct. 615 (1991), authorizes an agency to abdicate its responsibility to make requisite findings and determinations explicitly called for by the statute it is charged with administering. Indeed, the interlocutory nature of the court of appeals' remand order renders this case not yet ripe for review. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967).

2. The government's reliance on the 1990 Amendment to RPSA is also without merit. Rather than defying the congressional directive, as argued by the government, the court of appeals correctly ruled on the petition for rehearing that the 1990 Amendment "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.' " Since the court of appeals, in its original opinion, had held that the ICC had not made adequate findings under Section 402(d)(A) and (B), it found that its conclusions "are not disturbed by the statutory amendment." 925 F.2d at 428. Judge Ginsburg adhered to her views and, in the face of the 1990 Amendment, stated:

> I remain of the view, however, that the ICC *itself* has not yet stated, with supporting findings, that the picture of an intransigent Boston and Maine Railroad drawn by Amtrak is in fact accurate.

925 F.2d at 428 (emphasis in original).

Senator Jeffords introduced the 1990 amendment to the unrelated Independent Safety Board Act Amendments of 1990 on October 27, 1990, the last full day before adjournment. 136 Cong. Rec. S 17668 (daily ed. October 27, 1990). The House accepted the amendment without debate. The Independent Safety Board Act, together with numerous other pieces of legislation (including the much debated tax and deficit reduction measure) was passed on the same date, October 27, 1990.

The 1990 Amendment added the following new sentence to Section 402(d)(1) of RPSA:

> The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.

Senator Jeffords submitted a brief statement which was inserted in the Congressional Record. There was neither debate in the Senate or the House nor any committee hearings or reports on the 1990 Amendment. In the portion of his statement not quoted in the government's petition, Senator Jeffords offered the following explanation of the court of appeals decision:

> The court decision, however, ruled that Amtrak's subsequent transfer of the line to another railroad for rehabilitation and maintenance exceeded the court view of Amtrak's powers.

136 Cong. Rec. S 17668 (daily ed. Oct. 27, 1990). This rather limited characterization of the decision below fails to come to grips with the nub of the court of

appeals' ruling and does not deal in any way with the unanimous holding that the Commission failed to make the findings required by Section 402 of RPSA. Although the Amendment may affect the majority's conclusion that Section 402(d) does not authorize Amtrak to convey condemned railroad property to a third party, it does not alter the court's conclusion that the Commission is required by Section 402(d) to make adequate findings to support the use of the eminent domain power in the first instance. The 1990 Amendment on its face deals only with one aspect of the decision below and thus fails to address the vice that the court of appeals found in the ICC's flawed administrative proceeding. At best, then, Senator Jeffords' explanation deals with only one aspect of the decision below. It does not address the core rulings of the court of appeals which occasioned a remand because the Commission had "shirked its obligation" to make adequate determinations. 911 F.2d at 755.

In light of the absence of any meaningful legislative history, the language of the 1990 Amendment plainly has no effect on this aspect of the ruling of the court of appeals. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971) ("because of this ambiguity [in the legislative history,] it is clear that we must look primarily to the statutes themselves to find the legislative intent").

The court of appeals correctly ruled that the narrow 1990 Amendment which authorizes Amtrak to convey property subsequent to a condemnation that is otherwise valid under Section 402 (d)(1) does not affect the requirement that the condemnation must be valid

in the first place. There is no warrant for review by this Court.

3. The government's exaggerated description of the impact of the court of appeals decision is unfounded and provides no justification for review by this Court.[5] The government admits that in fifteen years since the enactment of the condemnation provision, this is the "first case" (Pet. 24). Indeed, the agency's Final Decision pointed out that the Commission agreed with Amtrak's "acknowledge[ment] that this is an extraordinary proceeding." (Pet. App. 39a). The court of appeals also took note of the Commission's concession that the use of Section 402(d) was "extraordinary." 911 F.2d at 749.

In the same vein, Chairman Gradison of the Commission filed a vigorous dissent which set forth her objection to:

> the attempt by Amtrak to restructure as between private, competing rail common carriers of freight that part of the ownership of the Conn River Line which it has admitted it does not need and does not want. The record is shockingly clear in this regard. . . .
>
> [I]t is hard to imagine a more blatant misuse of the public's eminent domain power than for it to be employed for the personal enrichment of private interests . . . .

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[5] Contrary to petitioners' assertion that Montrealer service is jeopardized by the decision of the court of appeals, the Conn River Line tracks and roadbed were upgraded subsequent to the Commission's decision in this case, and Montrealer service now runs regularly. Thus, the court of appeals' decision does not threaten impairment of continued Montrealer service.

Pet. App. at 96a-97a. Although the Commission's decision fails to make the necessary findings and determinations to support the use of the condemnation power, certain facts are unmistakeably clear from the record. The attempt by Amtrak and Central Vermont to transfer the Conn River Line from Boston and Maine to its arch competitor by using Section 402(d) of RPSA was never within the contemplation of the Congress when it added subsection (d) in 1973 as a modest additional tool so that Amtrak, if it needed to relocate a station, could avoid being placed in a disadvantageous bargaining position. Nothing in the legislative history (let alone the plain language of the statute) supports the attempt by Amtrak to use the eminent domain provision to substitute one lessor of tracks for another. Thus, the government's rendition of the dire consequences resulting from the court of appeals decision is borne out neither by the record in this case nor by the statute or its legislative history. The procedure followed by Amtrak in this case can scarcely be the paradigm for future negotiations in the rail industry.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1991